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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/892,424
Filing Date: June 27, 2001
Appellant(s): BARTLEY ET AL.

Bret J. Petersen
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed on 12/01/2005 appealing from the Office action mailed on 05/27/2005.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

Pub. No. 2002/0052947 Duimovich et al. 05/2002

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

1. Claims 1-22 are presented for examination.
2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. § 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

or

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999 (AIPA) and the Intellectual Property and High Technology Technical Amendments Act of 2002 do not apply when the reference is a U.S. patent resulting directly or indirectly from an international application filed before November 29, 2000. Therefore, the prior art date of the reference is determined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).

3. Claims 1-22 are rejected under 35 U.S.C. § 102(e) as being anticipated by Duimovich et al. (Duimovich) Pub. No. 2002/0052947.

4. As to claims 5, Duimovich teaches a networked computer system comprising:

(A) a first computer system (Director Server Site 120, figure 1; page 2, paragraph [0033]);

(B) a second computer system coupled to the first computer system via a network (end user site 50, figure 1; page 2, paragraph [0033]), the second computer system comprising:

(B1) a performance data collection mechanism that collects performance data for the second computer system (page 2, paragraph [0033]);

(B2) a performance data transmission mechanism that, when enabled, transmits at least a portion of the performance data to the first computer system (page 2 paragraph [0033]; page 5 paragraphs [0046 - 0058]); and

(B3) a performance data access mechanism that allows access to the performance data by a user of the second computer system only if the performance data transmission mechanism is enabled (page 3 paragraphs [0039-0041]; page 6, paragraphs [0066-0082]).

As to claims 6, Duimovich teaches the first computer system comprises a vendor computer system and the second computer system comprises a customer computer system (page 3, paragraph [0036]).

5. As to claims 7, Duimovich teaches performance data comprises data collected by an operating system (page 3, paragraph [0037]; and tables 1-2 begin on page 3).
6. Claims 1-4 and 8-22 have similar limitations as claims 5-7; therefore, they are rejected under the same rationale.

(10) Response to Argument

(I) As to group I, Applicant's arguments related to limitations in claims 1 and 5.

Applicant argues that prior art does not teach a performance data access mechanism that allows access to the performance data by a user of the second computer system only if the performance data transmission mechanism is enable.

As to point (I), Duimovich teaches User Site 50 enables performance data transmission mechanism by allowing Client Application 70 to be installed, updated, and configured on the User Site 50 for collecting and transmitting the performance data to Director Server 120. The Client Application 70 provides a collection of files that comprise Network Interface Monitor 175, a Shared memory module 180, and Agent 185. Agent 185 provides various functions; one of the Agent's functions is to provide performance data access mechanism to read to the performance data by the user only if the Client Application 70 is installed to enable for collecting and transmitting the performance data to the Director Server

120 (page 3, paragraphs [0039-0041]; page 5, paragraphs [0046-0058]; and page 6, paragraphs [0066-0082]).

Specifically, Duimovich teaches Client Application 70 is a collection of files that reside on the User Site 50 for the purpose of collecting, in the preferred embodiment, web browser-based HTTP performance data and transmitting that data to the Director Server 120. The Client Application 70 comprises three main components, a Network Interface Monitor (NIM) 175, a Shared memory module (Shmem) 180 and an Agent 185. The NIM 175 captures Internet Application 60 communications to the User Site's network interface. The NIM 175 creates a message for each communication containing raw performance data. The NIM 175 then writes the message in a shared memory segment through the Shmem 180 API so that it may be read by the Agent 185 via the Shmem 180 API (page 3, paragraphs [0039-0041]).

Various functions of the Agent 185 can be divided into threads to operate independently as set out in FIG. 3. In the preferred embodiment, one of the agent process is to read completed page summaries produced by the data summarization thread, packages preferably according to communication protocol, for example a binary protocol embedded within HTTP, understood by the Director Server Application 125 and Agent 185, and transmits the packaged messages to the Director Server 120 (page 5, paragraphs [0046 - 0058]).

Communication between the Agent 185 and Authority Server 100 permits the refreshing of the Agent's configuration information and automatic updating of

the Client Application 70. There is value in utilizing page summary data beyond simply transmitting it to the Director Server. Agent Plug-in threads may be used for example to analyze page summary data to determine if a particular host is performing below specified thresholds (e.g. throughput). User Site 50 may be operated as a remote monitoring service to provide: advanced logging output (e.g. web server log format); triggering trace route analysis; triggering server ping analysis; or triggering alarms (e.g. via email) (page 6, paragraphs [0066-0082]).

Therefore, Duimovich teaches one function of the Agent 185's is allowing access to the performance data by a user of the User Site 50 only if the User Site 50 enables performance data transmission mechanism by allowing Client Application 70 to be installed and configured on the User Site for collecting and transmitting the performance data to Director Server 120.

(II) As to group II, Applicant's arguments related to limitations in claims 2 and 6.

Applicant argues that prior art does not teach relationships of vendor and customer are related to the first and computer systems.

As to point (II), Examiner notes that applicant raises new arguments that have not been submitted in any prior submissions. Moreover, Duimovich teaches E-business, E-commerce, or on-line service providers where User Site 50 (customer) collects performance data and transmits to Director Server 120 (vendor) (page 2, paragraph [0033]; page 3, paragraph [0036]).

(III) As to group III, Applicant arguments related to limitations in claims 3-4 and 7.

Applicant argues that prior art does not teach the performance data collected by the operating system.

As to point (III), Examiner notes that applicant raises new arguments that have not been submitted in any prior submissions. Moreover, Duimovich teaches an operating system (OS) running on User Site 50 inherently collects performance data on the User Site 50 (Duimovich, page 3, paragraph [0037]; Applicant also admitted Duimovich's inherent teaching in the Background of the Invention of applicant's specification, page 2, lines 17-20; Current operating systems collect performance data as a computer runs). Moreover, Duimovich teaches additional performance data can be collected using Network Interface Monitor 175 (Tables 1-2 begin on page 3).

(IV) As to group IV, Applicant arguments related to limitations in claims 8-9.

Applicant incorporates the arguments with respect to claims 1 and 5 in this section.

As to point (IV), Duimovich teaches the claimed invention as discussed above. Duimovich teaches User Site 50 enables performance data transmission mechanism by allowing Client Application 70 to be installed, updated, and configured on the User Site 50 for collecting and transmitting the performance data to Director Server 120. The Client Application 70 provides a collection of

files that comprise Network Interface Monitor 175, a Shared memory module 180, and Agent 185. Agent 185 provides various functions; one of the Agent's functions is to provide performance data access mechanism to read to the performance data by the user only if the Client Application 70 is installed to enable for collecting and transmitting the performance data to the Director Server 120. On the other hand, if the Client Applicant 70 is installed but not being configured to transmit the performance data to the Director Server 120, the Agent does not need to access to read the performance data nor to allow the user to access the performance data (page 3, paragraphs [0039-0041]; page 5, paragraphs [0046-0058]; and page 6, paragraphs [0066-0082]).

(V) As to group V, Applicant arguments related to limitations in claims 10-11.

Applicant argues that prior art does not teach the following steps: (C) if the user requests to access more than the limited portion of the performance data: (C1) the second computer system determining whether transmission of the performance data from the second computer system to the first computer system is enabled; (C2) if transmission of the performance data from the second computer system to the first computer system is enabled, allowing the user to access the requested performance data; and (C3) if transmission of the performance data from the second computer system to the first computer system is not enabled, not allowing the user to access the requested performance data.

As to point (V), Examiner notes that applicant raises new arguments that have not been submitted in any prior submissions. Examiner agrees with applicant that the prior art of record does not explicitly teach if the user requests to access more than the limited portion of the performance data, then the second computer system determining whether transmission of the performance data from the second computer system to the first computer system is enabled. Therefore, claims 10-11 are allowable.

(VI) As to group VI, Applicant arguments related to limitations in claims 12-22.

Applicant argues that Examiner provides ground of rejections but no reasons were given for rejecting claims 12-22.

As to point (VI), Examiner notes that applicant raises new arguments that have not been submitted in any prior submissions. Moreover, in the Final Office Action mailed on 05/27/2005, Examiner stated that claims 1-22 are rejected under 35 U.S.C. § 102(e) as being anticipated by Duimovich et al. (Duimovich) Pub. No. 2002/0052947. Examiner provided rationale how claims 5-7 can be rejected using Duimovich's teachings. In addition, Examiner stated that claims 1-4 and 8-11 have similar limitations as claims 5-7; therefore, they are rejected under the same rationale. There was a typographical error in the Final Office Action mailed on 05/27/2005. The claim number "8-11" should have been typed as "8-22". Examiner should have stated that claims 1-4 and 8-22 have similar limitations as claims 5-7; therefore, they are rejected under the same rationale.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

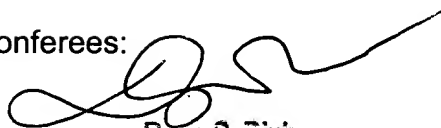
For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,



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PRIMARY EXAMINER

Conferees:



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